

No. 10931

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

---

WILLIAM JENNINGS BRYAN, JR., Individually and  
as Collector of Customs for the Port of Los Angeles,  
Customs Collection, District No. 27,

Appellant,

vs.

UNION OIL COMPANY OF CALIFORNIA, a cor-  
poration,

Appellee.

---

**TRANSCRIPT OF RECORD**

Upon Appeal from the District Court of the United States  
for the Southern District of California,  
Central Division

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**FILED**

FEB 14 1945

**PAUL P. O'BRIEN,**  
CLERK



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## INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italics; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

	Page
Affidavit of R. S. Field.....	7
Answer .....	33
Exhibit A. Oath of Master of Montebello on Entry San Luis, California.....	36
Appeal:	
Notice of .....	73
Statement of Points on.....	74
Bill of Complaint for Recovery of Tonnage Duty or Tax Illegally Exacted by the Collector of Customs	2
Certificate of Clerk.....	76
Certificate of Probable Cause.....	70
Final Decree .....	68
Findings of Fact and Conclusions of Law.....	60
Memorandum of Costs and Disbursements.....	72
Motion for Summary Judgment and Other Relief.....	6
Names and Addresses of Attorneys.....	1
Notice by Clerk of Entry of Judgment.....	71
Notice of Appeal.....	73
Notice of Entry of Order Denying Motion for Sum- mary Judgment .....	31
Notice of Hearing on Motion for Summary Judgment	30
Notice of Substitution of Attorneys by Consent.....	32
Opinion .....	45
Order Denying Motion for Summary Judgment.....	31
Statement of Points to Be Relied Upon by Appellant....	74
Statement of Points to Be Relied Upon by Appellant, and Designation of Record Submitted for Consid- eration on Appeal (Circuit Court).....	78
Stipulation of Facts.....	39
Substitution of Attorney.....	32



NAMES AND ADDRESSES OF ATTORNEYS:

For Appellant:

CHARLES H. CARR,  
United States Attorney,

RONALD WALKER,

WM. W. WORTHINGTON,  
Assistants U. S. Attorney,

600 U. S. Post Office and Court House Bldg.  
Los Angeles 12, Calif.

For Appellee:

WALTER I. CARPENETI,  
354 S. Spring Street  
Los Angeles 13, Calif. [1\*]

\*Page number appearing at foot of Certified Transcript.

In the District Court of the United States for the  
Southern District of California, Central Division

Civil No. 1749- O'C

UNION OIL COMPANY OF CALIFORNIA, a cor-  
poration,

Plaintiff,

vs.

WILLIAM JENNINGS BRYAN, JR., individually and  
as Collector of Customs for the Port of Los Angeles,  
Customs Collection District No. 27,

Defendant.

BILL OF COMPLAINT FOR RECOVERY OF TON-  
NAGE DUTY OR TAX ILLEGALLY EX-  
ACTED BY THE COLLECTOR OF CUSTOMS.

Comes now the above-named Plaintiff, and respectfully  
shows:

### I

Plaintiff is a corporation organized and existing under the laws of the State of California, having been incorporated in the year 1890 for the purpose of exploring, mining, extracting, producing, refining, selling, importing, exporting, distributing and transporting by land and sea, petroleum, oil, hydrocarbon substances and their by-products and derivatives; that Plaintiff is a citizen of the State of California with its principal place of business in Los Angeles, California.

### II

That Defendant William Jennings Bryan, Jr., is the duly appointed, qualified and acting Collector of Customs in and for Customs Collection District No. 27, and Port



of San Luis, California; that among other duties of the said Defendant as such Collector of [2] Customs, he is charged, under the laws of the United States, with the supervision, authority and control over the entrance and clearance of vessels arriving at said Port from foreign ports; and with the exaction and collection of entrance and clearance fees and the collection of tonnage duty or tax on vessels arriving at said Port from foreign countries; that said Defendant is a citizen of the State of California and resides in the said city and county of Los Angeles, State of California.

### III

That this is a suit at law of a civil nature, arising under the Constitution and the laws of the United States providing for the collection of a tonnage duty or tax, as is hereafter more fully set forth, and is a case of actual controversy between the Plaintiff and the Defendant involving the validity, force and effect of a law of the Congress of the United States of America under the Constitution of the United States of America.

### IV

That Plaintiff now is, and was at all times herein mentioned, the owner and operator of an ocean-going vessel of 5107 net tons, which said vessel is known as the American Tank Steamer "Montebello", and at all times herein mentioned was registered to engage in the foreign trade under the laws of the United States, at the Port of Los Angeles, and at all times herein mentioned was used and employed by the Plaintiff in transporting Plaintiff's products in the foreign trade.

That Plaintiff was the payor of all fees, duties, and taxes herein mentioned.

**V.**

That the said vessel, on October 23, 1940, at Los Angeles, California, loaded 20,163 barrels of crude petroleum, 29,903 barrels of fuel oil and 25,328 barrels of diesel oil, destined for [3] discharge at various ports in Chili, and on said date cleared from the Port of Los Angeles to the Port of Iquique, Chile.

That the said vessel, on November 12, 1940, discharged 11,241 barrels of fuel oil at Iquique, Chile, and cleared for Valparaiso, Chile, where on November 17, 1940, the said vessel discharged 19,905 barrels of crude oil; that said vessel thereupon cleared for Antofagasta, Chile, where it discharged the remaining cargo. .

That the said vessel then proceeded in ballast to Talara, Peru, and on November 27, 1940, loaded 76,984 barrels of crude petroleum and cleared for Ioco, British Columbia, where the entire cargo was discharged on December 17, 1940.

That the said vessel then proceeded in ballast to Port San Luis, California, arriving on December 24, 1940.

**VI.**

That on the entry of said vessel at the Port of San Luis as aforesaid, the Defendant did then and there require and demand of and receive from the said Plaintiff the payment of tonnage duty or tax at the rate of 6 cents per ton or in the total sum of Three Hundred Six and Forty-two One-Hundredths (\$306.42) Dollars, which payment is covered by tonnage tax certificate number 440664.

VII

That the Plaintiff and the Master of said vessel complied with all the laws, rules and regulations, terms and provisions in connection with and entitling said vessel to pay tonnage tax or duty at the rate of 2 cents per ton.

VIII

That the demand and collection of the said tonnage duty or tax in excess of 2 cents per ton from the Plaintiff was and is illegal, arbitrary, oppressive and deprives Plaintiff of his property without due process of law. [4]

Wherefore, Plaintiff prays for judgment in the sum of Two Hundred Four and Twenty-eight One-Hundredths (\$204.28) Dollars, together with costs of suit, interest from date of exaction, and such other relief as the court may deem meet in the premises.

Dated: Los Angeles, California, August 29, 1941.

UNION OIL COMPANY OF CALIFORNIA,  
Plaintiff,

By ABRAHAM GOTTFRIED  
ABRAHAM GOTTFRIED  
Attorney for Plaintiff.

Address:

Abraham Gottfried  
354 South Spring Street  
Los Angeles, California  
MUtual 9492

[Endorsed]: Filed Sep. 2, 1941. [5]

[Title of District Court and Cause.]

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND OTHER RELIEF

The defendant, William Jennings Bryan, by his attorney, William Fleet Palmer, respectfully moves this court for summary judgment and dismissal of the complaint in the above entitled action, upon the ground that there is no substantial issue as to any material fact and defendant is entitled to judgment in his favor as a matter of law in that:

1. The Act of July 5, 1884, c. 221, sec. 3, as amended and supplemented, (46 U. S. C. 3), provides that the decisions of the Director of the Bureau of Marine Inspection and Navigation in tonnage tax refund cases shall be final, and therefore this court has no jurisdiction to review his decisions, nor can this court substitute its judgment for that of the Director.

2. The vessel was entered as from Talara, Peru, and tonnage tax and duty at the six-cent rate was proper.

This motion is based on the complaint and on the annexed affidavits and certified copies of documents attached thereto.

Wm. Fleet Palmer

United States Attorney [6]

[Title of District Court and Cause.]

AFFIDAVIT

District of Columbia, City of Washington—ss.

I, R. S. Field, being duly sworn on oath, deposes and says:

1. That he is the Director of the Bureau of Marine Inspection and Navigation, Department of Commerce.

2. That annexed hereto are certified copies of documents on file with the Director of the Bureau of Marine Inspection and Navigation, Department of Commerce, upon which action was taken, namely:

Exhibit A: Oath of Master of Montebello on entry San Luis, California.

Exhibit B: Letter from Deputy Collector at San Luis to Collector at Los Angeles, dated May 9, 1941.

Exhibit C: Letter from Collector at Los Angeles to Director, Bureau of Marine Inspection and Navigation, dated May 14, 1941. [7]

Exhibit D: Letter from Union Oil Company of California to Director, Bureau of Marine Inspection and Navigation, dated May 7, 1941.

Exhibit E: Letter from Director, Bureau of Marine Inspection and Navigation to Collector at Los Angeles, dated May 21, 1941.

Exhibit F: Letter from Director, Bureau of Marine Inspection and Navigation to Deputy Collector at San Pedro, dated January 25, 1939, in the case of the On-

tariolite, which case was cited both in letter of the Union Oil Company (exhibit D) and in the decision of the Director, Bureau of Marine Inspection and Navigation (exhibit E).

Exhibit G: Letter from Director, Bureau of Marine Inspection and Navigation to Deputy Collector at San Pedro dated February 24, 1938, in the case of the Rotterdam, which case was cited both in the letter of the Union Oil Company (Exhibit D) and in the decision of the Director, Bureau of Marine Inspection and Navigation (exhibit E).

R. S. Field

Sworn to and submitted before me on the 17 day of January, 1942.

(Seal)

F. B. Myers  
Notary Public

[Endorsed]: Filed Jan. 31, 1942. [8]

---

DEPARTMENT OF COMMERCE

---

Washington, November 26, 1941

I hereby certify that the annexed is a true photostatic copy of the original oath of the Master of the Montebello on his entry from Talara, which is certified by the Deputy Collector at Port San Luis, May 9, 1941 on file at the offices of the Bureau of Marine Inspection & Navigation.

R S Field  
Director  
(Official title)

OFFICE OF THE SECRETARY

I hereby certify that Richard S. Field who signed the foregoing certificate, is now, and was at the time of signing, Director, Bureau of Marine Inspection & Navigation and that full faith and credit should be given his certificate as such.

In witness whereof, I have hereunto subscribed my name, and caused the seal of the Department of Commerce to be affixed this 26th day of November, one thousand nine hundred and 41.

For the Secretary of Commerce:

[Seal]

E W Libbey  
Chief Clerk [9]

Copy

UNITED STATES CUSTOMS SERVICE

---

[Not legible.]

Nationality American  
Crew 39.

Master's Oath on Entry of Vessel From Foreign Port

I, M. Andreasen, solemnly swear that I am now and was during this voyage the master of the American S/S "Montebello" that arrived at Port San Luis, Calif., on (Flag, rig or power, name)

December 24, 1940; that this voyage began at Talara, Peru on November 28, 1940, and included the following ports from which said vessel sailed in the order and on the date stated, viz, Vancouver, B. C. 12/17/40. that the manifest subscribed in my name, and now delivered by me to the Collector of the Port named above, contains, to the best of my knowledge and belief, a just and true account of all the goods, wares, and merchandise, includ-

ing packages of every kind and nature whatsoever, which were laden or taken on board the above-named vessel at the said ports or at any time since at other ports or places, together with the names of the passengers and the number of pieces of baggage taken by each passenger at such ports, and that clearance and other papers now delivered by me to the Collector are all that I now have, or have had, that in any way relate to the cargo of the said vessel; and I do further swear that the several articles specified in the said manifest as sea and ship stores are truly such and are solely for use on the vessel or for the use of the officers, crew, and passengers, and are not intended for sale, or for any other purpose than above mentioned. And I further swear that if I shall hereafter discover or know of any other or greater quantity of goods, wares, and merchandise of any nature or kind whatsoever than are contained in this manifest, I will immediately and without delay make due report thereof to the Collector; and I do likewise swear that all matters whatsoever, in the said manifest are, to the best of my knowledge and belief, just and true; and I further swear that there has been no previous inspection and certification by customs officers of this manifest. I further swear that I have delivered or caused to be delivered to the proper postal officers all mail on board the said vessel during her last voyage. And I further swear, if entering at a sub-comptroller office port, that before entering said vessel at the customhouse I mailed to the comptroller of customs having jurisdiction over the accounts of the collection district in which entry of the vessel is to be made, a true copy of the manifest.

And, if master of an American vessel, I further swear that the statement of services performed by consular agents contains only such services as were necessarily and



actually performed at my request: and I further swear that in all cases where consular services were required and performed, statements of such services were given me by such consular officers, except at the ports of ..... and that I have no other papers relating to consular transactions. I further swear that the register of the said vessel, herewith presented, contains the name or names of the owner or owners of said vessel, except ....., and that no foreign subject or citizen has, to the best of my knowledge and belief, any share, by the way of trust, confidence, or otherwise, in the said vessel.

Sgd: M. Andreasen,  
Master.

Sworn to before me on December 24, 1940

Sgd: E. A. Palfrey,  
a Acting Deputy Collector.  
Port San Luis, Calif., May 9, 1941.

I Certify this to be a true and correct copy of the Original filed at this office.

E. F. James  
Deputy Collector.

Time entered: 9:30 A. M.

Deaths nil

Tonnage 5107 net.

Tonnage tax certificate No. 440664

Fee certificate No. 944118.

Fees under Sec. 2654, R. S. 2.50

Fees under Sec. 4186, R. S. —

Tonnage duty \$306.42 Date 1st., Payment 12/24/40

Date last payment—12/24/40.

Tonnage certificate fee .....

(Foreign vessels) [10]

## DEPARTMENT OF COMMERCE

---

Washington, November 26, 1941

I hereby certify that the annexed is a true photostatic copy of the original letter dated May 14, 1941, to the Director of the Bureau of Marine Inspection & Navigation from the Collector of Customs at Los Angeles, California on file in the offices of the Bureau of Marine Inspection & Navigation

R S Field  
Director  
(Official title)

---

OFFICE OF THE SECRETARY

I hereby certify that Richard S. Field who signed the foregoing certificate, is now, and was at the time of signing, Director, Bureau of Marine Inspection & Navigation and that full faith and credit should be given his certificate as such.

In witness whereof, I have hereunto subscribed my name, and caused the seal of the Department of Commerce to be affixed this 26th day of November, one thousand nine hundred and 41.

For the Secretary of Commerce:

[Seal]

E W Libbey  
Chief Clerk [11]

In Reply Refer to: 140.  
Amer. S. S. "Montebello".

TREASURY DEPARTMENT

United States Customs Service

Los Angeles, Calif. May 14, 1941.

[Crest]

Office of the Collector

District No. 27

Address All Communications

For This Office to the Collector

May 20 | 4 | | |

Director,

Bureau of Marine Inspection and Navigation,

Department of Commerce,

Washington, D. C.

Sir:

In accordance with the provisions of Art. 135, Customs Regulations of 1937, and Bureau of Navigation General Letter No. 270, dated April 7, 1925, there is transmitted herewith the application in duplicate, of the Union Oil Company of California, for refund of excess tonnage tax collected in the amount of \$204.28, which it is alleged was exacted in error upon arrival of the vessel at the port of Port San Luis, California, on December 24, 1940, from Talara, Peru, via Vancouver, B. C., Canada, the applicant stating that collection was made at the 6-cent rate whereas assessment of tonnage tax should have been made at the 2-cent rate.

In connection with the application for refund there is transmitted herewith copy of report from the Deputy Collector in Charge, Port San Luis, California, dated May 9, 1941, wherein the facts as to the assessment and collection of tonnage tax in this case are outlined. Copy of Customs Form 3251, Master's Oath on Entry of Vessel from Foreign Port, which outlines the voyage is also submitted herewith. It will be noted in statement made in the letter of the Deputy Collector in Charge at Port San Luis, California, that the voyage began at Talara, Peru, and included Vancouver, B. C., Canada, and was ended at Port San Luis, California, on December 24, 1940. It will be noted that in view of the facts as set forth after due inquiry it was the opinion that tonnage tax was due at the maximum rate and assessment and collection were made accordingly.

It will be appreciated if you will kindly advise this office as to your decision in this case at as early a date as practicable.

Respectfully,

Wm. Jennings Bryan, Jr.,  
Collector of Customs,

By: Chas. W. Salter  
Assistant Collector of Customs.

Legal Division Bureau of Marine Inspection & Navigation Dept. of Commerce May 20 1941 Inc. Washington, D. C. [12]

DEPARTMENT OF COMMERCE

---

[Not legible]

Washington, November 26, 1941

I hereby certify that the annexed is a true photostatic copy of the original letter dated May 7, 1941, to the Director of the Bureau of Marine Inspection & Navigation from the Union Oil Company of California on file in the offices of the Bureau of Marine Inspection & Navigation

R S Field  
Director  
(Official title)

---

OFFICE OF THE SECRETARY

I hereby certify that Richard S. Field who signed the foregoing certificate, is now, and was at the time of signing, Director, Bureau of Marine Inspection & Navigation and that full faith and credit should be given his certificate as such.

In witness whereof, I have hereunto subscribed my name, and caused the seal of the Department of Commerce to be affixed this 26th day of November, one thousand nine hundred and 41.

For the Secretary of Commerce:

[Seal]

E W Libbey  
Chief Clerk. [13]

San Pedro 4870

## GUY B. BARHAM COMPANY

Established 1890

Custom House, Ship and Export Brokers, Freight  
Contractors, Forwarding, Distributing, Marine  
and General Insurance Agents

354 South Spring Street

Los Angeles, California

Cable Address

"Barhamco"

Los Angeles

1890

[Crest] 50 Years of Service

1940

Harbor Office

105 W. Seventh Street

San Pedro, California

San Pedro, California.

May 7th, 1941.

To the  
Director

Bureau of Navigation and Marine Inspection,  
Washington, D. C.

Sir:

The American Tank Steamer "Montebello" arrived at Port San Luis, California, on December 24th, 1940, from Vancouver, B. C., Canada, in ballast, and was erroneously assessed tonnage tax at the maximum rate, same amounting to \$306.42 covered by tonnage tax certificate No. 440664.

On the previous voyage the vessel loaded at Los Angeles, California, on October 23rd, 1940, said cargo being discharged at Iquique, Valparaiso and Antofagasta, Chile.

The vessel proceeded in ballast to Talara, Peru, loading a cargo there on November 27th, which was dis-

charged at Vancouver, B. C., Canada, on December 17th, 1940.

Vessel then proceeded in ballast to Port San Luis, California, and we contend that tonnage dues should have been assessed at the minimum rate. This in accordance with Department decisions of Feb. 24, 1938 in the "Rotterdam" case and those covering several similar voyages of the Br. MS "Ontariolite", decisions dated Sept. 22, 1938 and that of January 25, 1939, your file 3-30349.

We, therefore, make application for the refund of \$204.28, the amount of tax erroneously assessed.

Respectfully yours,

Union Oil Company of California, Owners.  
By [Not legible] Atty-in-Fact.

Subscribed and Sworn to before me this 7th day of May, 1941.

[Not legible]

Members of the Los Angeles Chamber of Commerce  
Since 1894 [14]

DEPARTMENT OF COMMERCE

---

Washington, November 26, 1941

I hereby certify that the annexed is a true photostatic copy of the original letter from the Deputy Collector of Customs at the Port of San Luis to the Collector of Customs at Los Angeles, dated May 9, 1941 on file in the offices of the Bureau of Marine Inspection & Navigation

R S Field  
Director  
(Official title)

## OFFICE OF THE SECRETARY

I hereby certify that Richard S. Field who signed the foregoing certificate, is now, and was at the time of signing, Director, Bureau of Marine Inspection & Navigation and that full faith and credit should be given his certificate as such.

In witness whereof, I have hereunto subscribed my name, and caused the seal of the Department of Commerce to be affixed this 26th day of November, one thousand nine hundred and 41.

For the Secretary of Commerce:

[Seal]

E W Libbey  
Chief Clerk. [15]

[Not legible]

3-7643

Port San Luis, Calif.,  
May 9, 1941.

Collector of Customs,  
Los Angeles, Calif.

Copy

Sir:

Reference is made to the enclosed application, filed by the Union Oil and Guy B. Barham Company, for the refund of \$204.28, the amount of tonnage tax claimed erroneously assessed on the American Tank Steamer "Montebello", of the Union Oil Company, upon entry at this port on December 24, 1940.

Records at this office show on the Masters Oath, Customs Form No. 3251, filed at the time of entry that this voyage began at Talara, Peru, on November 28, 1940,



included Vancouver, B. C., on December 17, 1940, and ended at Port San Luis, Calif., on December 24, 1940.

Inquiry of Captain Andreasen, the Master, at time of entry developed that on October 23, 1940, the crew was signed for a voyage to Iquique, Valparaiso and Antifagasta, Chile, of not over six months and back to a Pacific Coast port to be designated by the Master.

After discharging cargo at ports as above stated, the vessel proceeded to Talara, Peru, where cargo was laden for Vancouver, B. C., also crew purchases; Sailing from there November 28, 1940.

Upon arriving and discharging cargo only at Vancouver, B. C., on December 17, 1940, the vessel sailed the same day in ballast for Port San Luis, Calif., arriving here December 24, 1940, where, after entry, the crew was paid off, crew purchases entered, the Document changed from Register to Enrollment, the voyage officially ended and the vessel engaged in coastwise trade.

In view of the Masters statements, verified by inquiry, that it was known to him at the time of lading Vancouver cargo at Talara, that the voyage would end at Port San Luis, Calif., tonnage tax at the maximum rate, in the amount of \$306.42, was assessed and collected and deposited in Special Deposit, for which S, D. No. 4, dated December 27, 1940, was issued.

Certified copy of Customs Form No. 3251, together with application in triplicate here enclosed.

Respectfully,

E. F. James

E. F. James,

Deputy Collector in Charge.

## DEPARTMENT OF COMMERCE

---

Washington, November 26, 1941

I hereby certify that the annexed is a true photostatic copy of the original decision of the Bureau of Marine Inspection and Navigation in the case of the Montebello on file in the offices of the Bureau of Marine Inspection & Navigation

R S Field  
Director  
(Official title)

---

OFFICE OF THE SECRETARY

I hereby certify that Richard S. Field who signed the foregoing certificate, is now, and was at the time of signing, Director, Bureau of Marine Inspection & Navigation and that full faith and credit should be given his certificate as such.

In witness whereof, I have hereunto subscribed my name, and caused the seal of the Department of Commerce to be affixed this 26th day of November, one thousand nine hundred and 41.

For the Secretary of Commerce:

[Seal]

E W Libbey -  
Chief Clerk. [17]

May 21, 1941

3-7643

Subject: Refund tonnage tax

American Steamer Montebello (221100)

My dear Mr. Collector:

The Bureau has your letter of May 14, 1941, where-with you transmitted an application submitted by the Union Oil Company of California, owner of the American Tank Steamer Montebello, seeking a refund of tonnage taxes alleged to have been collected in excess from this vessel upon the occasion of her entry at Port San Luis, California, on December 24, 1940, from Talara, Peru, via Vancouver, B. C., Canada.

The affiant in its petition for refund states that the vessel loaded a cargo at Talara, Peru, for discharge at Vancouver, B. C.; that the vessel discharged all her cargo at Vancouver, and thereafter proceeded in ballast to Port San Luis; and that the facts in this case are analogous to the facts in the cases of the Netherlands SS Rotterdam and the British MS Ontariolite.

Your office has submitted an affidavit, executed by Captain M. Andreasen, master of the Montebello, in which Captain Andreasen has stated that the voyage from which his vessel entered the Port of San Luis, California, on December 24, 1940, originated at Talara, Peru, on November 28, 1940, and included the Port of Vancouver, B. C.

From the information submitted by the Deputy Collector of Customs in Charge at Port San Luis, California,

it appears that the crew of the *Montebello* was signed on for a voyage to ports in Chile and back to a Pacific Coast port to be designated by the master. It also appears that upon the discharge of the vessel's cargo at Vancouver, she sailed in ballast for Port San Luis, California, where the crew was paid off, the voyage officially ended, the vessel's document changed from registry to enrollment, and the vessel proceeded to engage in the coastwise trade. [18]

The facts in the instant case are not analogous to the facts in the cases of the British SS *Ontariolite*, for in the cases of the *Ontariolite* the vessel loaded cargoes at Talara, destined for discharge at Vancouver, B. C., Canada; all the cargoes laden on board at Talara, Peru, were discharged in Canada, and the vessel in both cases proceeded in ballast to Port San Luis to load a full cargo of crude oil for discharge at Ioco, B. C., Canada.

Neither are the facts in the instant case analogous to the facts in the case of the *Rotterdam*, for in that case the vessel took on cargo at Cutuco, El Salvador, for discharge at Bowling, Scotland, via your port.

In the case of the *Montebello*, it was the obvious intention of the vessel, upon her departure from Talara, Peru, to commence a voyage, the port of origin of which was Talara, and the port of ultimate destination of which was Port San Luis, California, via Vancouver, B. C.

This is borne out by the affidavit of the master of the *Montebello*, the paying off of the crew at Port San Luis, and the changing of the vessel's document from registry to enrollment and license.

In view of the foregoing, the action of your office in assessing maximum tonnage taxes upon the entry of the Montebello at your port on December 24, 1940, is approved, and the application of the Union Oil Company of California is denied.

Sincerely yours,

R. S. Field  
R. S. Field  
Director

Collector of Customs  
Los Angeles, California  
F. K. Arzt—ss [19]

DEPARTMENT OF COMMERCE

---

Washington, November 26, 1941

I hereby certify that the annexed is a true photostatic copy of the original decision of the Bureau of Marine Inspection & Navigation in the case of the Ontariolite on file in the offices of the Bureau of Marine Inspection & Navigation

R S Field  
Director  
(Official title)

---

OFFICE OF THE SECRETARY

I hereby certify that Richard S. Field who signed the foregoing certificate, is now, and was at the time of signing, Director, Bureau of Marine Inspection & Navigation and that full faith and credit should be given his certificate as such.

In witness whereof, I have hereunto subscribed my name, and caused the seal of the Department of Commerce to be affixed this 26th day of November, one thousand nine hundred and 41.

For the Secretary of Commerce:

[Seal]

E W Libbey  
Chief Clerk. [20]

January 25, 1939

Deputy Collector of Customs in Charge                      3-30349  
San Pedro, California

My dear Mr. Collector:

The Bureau is in receipt of an amended petition submitted by the Imperial Oil Shipping Company, Ltd., owner of the British motorship *Ontariolite*, through Guy B. Barham Company, seeking a refund of tonnage taxes alleged to have been collected in excess from this vessel upon the occasion of her arrival at Port San Luis, California, on October 12, 1937.

From the information before the Bureau, it appears that your office is of the opinion that this vessel is in regular trade with Port San Luis, and that when she left Talara, Peru, on the voyage in question, her ultimate destination was Los Angeles, California, via Vancouver, B. C.

The application of the owner of the vessel in question indicates that the *Ontariolite*, in the case under consideration, loaded a cargo at Talara, Peru, destined for discharge at Vancouver, B. C., Canada; that all the cargo laden on board at Talara, Peru, was discharged in Canada; and that the vessel proceeded in ballast to Port San

Luis to load a full cargo of crude oil for discharge at Ioco, B. C., Canada.

The Bureau over a period of years has determined that in order to effectively carry out the intent and purpose of Section 14 of the Act of June 26, 1884, as amended, it is necessary to consider the port of origin of the voyage of the vessel, and the port of ultimate destination, as well as the port from which the vessel entered at a port in the United States.

From the facts submitted by your office and the petitioner, it appears that the voyage of the *Ontariolite* from Talara, Peru to Port San Luis was not a single voyage with the stop at Vancouver, B. C. as a mere incident in the voyage and not a break in the continuity thereof, but that the voyage from Talara, Peru, terminated at Vancouver, B. C. upon the complete discharge of the [21] cargo laden at Talara, and that a new voyage, the port of origin of which was Vancouver, B. C., and the port of ultimate destination of which was Ioco, B. C., via Port San Luis, was commenced.

Hence, it would seem that upon the arrival of the *Ontariolite* at Port San Luis on October 12, 1937, tonnage tax at the minimum rate of 2¢ rather than at the maximum rate of 6¢ was assessable, and therefore the petition for refund of the difference between the maximum and minimum tonnage tax rates is granted.

Your office is requested to advise Guy B. Barham, agent of the *Ontariolite*, of the Bureau's decision in the premises in order that it may, if it so desires, file a petition on Cat. 1086 for a refund of the difference in the tonnage tax referred to herein.

When Guy B. Barham Company transmitted the corrected application for relief submitted by the Imperial Oil

Shipping Company, Ltd., it stated that it has not been advised of the Bureau's decision in connection with the application for refund submitted under date of September 2, 1938.

Upon a review of the Bureau's files, it is observed that on September 22, 1938, your office was informed that the petitions for refund of the difference between the maximum and minimum tonnage tax rates was granted in the instance of the arrival of the *Ontariolite* at your port on December 26, 1937, and July 6, 1938. The petition for refund, under date of September 2, 1938, to which Guy B. Barham Company refers, was the petition in connection with the arrival of the *Ontariolite* at your port on July 6, 1938. Therefore, since the Bureau has informed you as to the proper disposition of this petition for refund, you are requested to so advise Guy B. Barham Company.

Sincerely yours,

R. S. Field

R. S. Field

Director [22]

DEPARTMENT OF COMMERCE

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Washington, November 26, 1941

I hereby certify that the annexed is a true photostatic copy of the original decision of the Bureau of Marine Inspection & Navigation in the case of SS *Rotterdam* on file in the offices of the Bureau of Marine Inspection & Navigation

R S Field

Director

(Official title)



OFFICE OF THE SECRETARY

I hereby certify that Richard S. Field who signed the foregoing certificate, is now, and was at the time of signing, Director, Bureau of Marine Inspection & Navigation and that full faith and credit should be given his certificate as such.

In witness whereof, I have hereunto subscribed my name, and caused the seal of the Department of Commerce to be affixed this 26th day of November, one thousand nine hundred and 41.

For the Secretary of Commerce:

[Seal]

E W Libbey  
Chief Clerk. [23]

February 24, 1938

3-8653

Deputy Collector of Customs in Charge  
San Pedro, California

Dear Sir:

Reference is made to your letter of December 31, 1937 wherein your office furnished the Bureau with further information with regard to its action in assessing tonnage tax at the maximum six-cent rate against the Dutch motorship Rotterdam, upon the occasion of the entry of this vessel at your port on July 3, 1937.

It appears that your office based its action, in assessing the tonnage tax at the six-cent rate, upon the premise that the voyage of the Rotterdam, which terminated at your port on July 3, 1937, had as its port of origin, the port of Talara, Peru, and although the vessel stopped at several ports en route to fully discharge the cargo laden on board at Talara, Peru, your office did not deem the complete discharge of the vessel's cargo at minimum-rate

ports, a break in the continuity of the voyage, and, therefore, tonnage tax at the maximum rate was assessable.

Guy B. Barham Company, Agent for the Rotterdam, states that its principal's vessel loaded a cargo of gasoline and diesel fuel oil at Talara, Peru, which cargo was discharged at Balboa, Canal Zone, Corinto, Nicaragua and Cutuco, El Salvador.

It further states the voyage which emanated at Talara, Peru terminated at Cutuco, El Salvador and that a new voyage, in ballast, was commenced at Cutuco with the port of ultimate destination of the voyage as Bowling, Scotland with a stop at your port to take on cargo.

The Bureau, over a period of years, has determined that in order to effectively carry out the intent and purpose of Section 14 of the Act of June 26, 1884, as amended, it would be necessary to consider the port of origin of the voyage of the vessel and the port of ultimate destination, as well as the port from which the vessel [24] entered at a port in the United States.

From the facts submitted in the instant case, it appears that the voyage of the Rotterdam from Talara, Peru to your port was not a single voyage with the stops at the Canal Zone and Central American ports as mere incidents in the voyage and not a break in the continuity thereof, but that the voyage from Talara, Peru terminated at Cutuco upon the complete discharge of the cargo laden at Talara, and a new voyage, the port of origin of which was Cutuco and the port of ultimate destination of which was Bowling, Scotland via your port, was commenced.

Hence, it would seem that in the instant case tonnage tax at the minimum rate of two cents, rather than at the maximum rate of six cents was assessable upon the en-

try of the Rotterdam at your port from Cutuco, El Salvador, and, therefore, the petition for a refund of the difference between the maximum and minimum tonnage tax rates is granted.

Your office is requested to advise Guy B. Barham Company, Agent of the Rotterdam, of the Bureau's decision in the premises, in order that it may, if it so desires, file a petition on Cat. 1086 for a refund of the difference in the tonnage tax referred to herein.

Very truly yours,

H. C. Shephard,  
Acting Director. [25]

#### AFFIDAVIT

Washington, D. C.

December 4, 1941

I, Richard S. Field, Director, Bureau of Marine Inspection and Navigation, Department of Commerce, Washington, D. C., do hereby state that any party in interest to a navigation fine case or to a matter involving the payment of tonnage taxes, is granted, upon request, an opportunity to present orally before the Bureau any statement or argument which he may care to make in the matter, either to the Director of the Bureau of Marine Inspection and Navigation, or to one of his qualified assistants.

I swear that the foregoing statements are true.

Richard S. Field  
Richard S. Field,

Director Bureau of Marine Inspection & Navigation

Sworn to and subscribed before me this 4th day of December, 1941.

[Seal]

E. W. Libbey  
Notary Public. [26]

[Title of District Court and Cause.]

NOTICE OF HEARING ON MOTION FOR  
SUMMARY JUDGMENT

To the Plaintiff Union Oil Company of California and  
Abraham Gottfried, Its Attorney:

You are hereby notified that defendant's Motion for Summary Judgment in the above entitled action will be heard in the courtroom of the Honorable J. F. T. O'Connor, Courtroom No. 7, United States Post Office and Court House, Los Angeles, California, on the 29th day of June, 1942 at 10:00 a. m. or as soon thereafter as counsel can be heard.

WM. FLEET PALMER

United States Attorney

James L Crawford

JAMES L. CRAWFORD

Assistant U. S. Attorney

Attorneys for Defendant.

[Affidavit of Service by Mail.]

[Endorsed]: Filed Jun. 18, 1942. [27]

[Title of District Court and Cause.]

The motion of the defendant in the above entitled action for summary judgment is denied.

Dated this 11 day of September, 1942.

J. F. T. O'Connor

J. F. T. O'Connor

United States District Judge

[Endorsed]: Filed Sep. 11, 1942. [28]

Room 231 post office Building  
Los Angeles, California,  
Friday, September 11th, 1942.

Abraham Gottfried, Esq.,

Attorney at Law,

354 South Spring St.,

Los Angeles, Calif.

James L. Crawford, Esq.,

Asst. U. S. Attorney,

Post Office Building,

Los Angeles, Calif.

Gentlemen:

No. 1749 O'C. Civ. Union Oil Company of California,  
a corporation vs. William Jennings Bryan, Jr., etc.

Please be informed that under date of September 11th,  
1942, there was filed and entered an order denying the  
motion of defendant for a summary judgment.

Yours very truly,

EDMUND L. SMITH, Clerk.

BY: Francis E. Cross

Francis E. Cross, Deputy [29]

[Title of District Court and Cause.]

NOTICE OF SUBSTITUTION OF ATTORNEYS  
BY CONSENT

To the above named defendant, and to Leo V. Silverstein,  
United States Attorney; its attorney:

Please Take Notice that I have substituted Walter I. Carpeneti as my attorney in the place and stead of Abraham Gottfried, and that said Abraham Gottfried has in writing consented to said substitution.

Dated: October 12, 1942.

UNION OIL COMPANY OF CALIFORNIA,  
a corporation,

By J. B. Stene

Plaintiff.

Walter I. Carpeneti  
Attorney for Plaintiff.

[Endorsed]: Filed Oct. 15, 1942. [30]

[Title of District Court and Cause.]

SUBSTITUTION OF ATTORNEY

The plaintiff, UNION OIL COMPANY OF CALIFORNIA, a corporation, hereby substitutes WALTER I. CARPENETI as its attorney in the above-entitled action in the place and stead of Abraham Gottfried.

Dated: October 12, 1942.

UNION OIL COMPANY OF CALIFORNIA,  
a corporation,

By J. B. STENE

I hereby consent to the substitution of Walter I. Carpeneti as attorney for plaintiff, Union Oil Company of California, in the above entitled action in my place and stead:

Dated: September 26, 1942.

Abraham Gottfried  
Abraham Gottfried.

I hereby agree to be substituted in the place of Abraham Gottfried in the above-entitled action, as attorney for the plaintiff, Union Oil Company of California.

Dated: September 26, 1942.

Walter I. Carpeneti  
Walter I. Carpeneti

[Endorsed]: Filed Oct. 15, 1942. [31]

[Title of District Court and Cause.]

ANSWER.

Comes now the defendant and for answer to the complaint herein, admits, denies and alleges as follows:

I.

Admits the allegations contained in Paragraph I of the complaint.

II.

Admits the allegations contained in Paragraph II of the complaint.

III.

Denies the allegations contained in Paragraph III of the complaint. [32]

## IV.

Admits the allegations contained in Paragraphs IV, V and VI of the complaint.

## V.

Denies the allegations contained in Paragraphs VII and VIII of the complaint.

Further answering and for a separate and complete defense.

## VI.

Plaintiff herein on May 7, 1941, appealed to the Director of the Bureau of Marine Inspection and Navigation for a refund of the tonnage tax paid and, pursuant to the custom and regulations of that Bureau, who after a full, fair and adequate hearing denied the appeal, all as appears from the defendant's motion for summary judgment heretofore filed herein, which is incorporated by reference.

## VII.

The Act of July 8, 1884, c. 221, Sec. 3, as amended and supplemented (U. S. C. Title 46, Sec. 3), provides that the decisions of the Director of the Bureau of Marine Inspection and Navigation in tonnage tax refund cases shall be final. Therefore, the Court is without jurisdiction to review his decision or to substitute its judgment for that of the Director.

Further answering and for a further separate and complete defense,



VIII.

On or about December 24, 1940, the Master of the SS Montebello, as required by law and existing regulations filed the Master's oath on entry, certifying that his voyage began at Talara, Peru. (Exhibit A, annexed hereto and made a part hereof.)

IX.

The crew of the Montebello on the voyage in question signed articles for a voyage to Iquique, Valparaiso, and Antofagasta, [33] Chile, of not over six months, and back to a Pacific Coast port to be designated by the Master, and after entry at Port San Luis, California, the crew were paid off.

X.

After entry at Port San Luis, the official ship's documentation of the Montebello was changed from Register to Enrollment, by her owners and operators, limiting her operation then to coastwise service.

XI.

The Montebello did enter from Talara, Peru, and tonnage tax and duty at the six cent rate was proper.

LEO V. SILVERSTEIN,  
United States Attorney

James L. Crawford  
JAMES L. CRAWFORD,  
Assistant U. S. Attorney,

Attorneys for Defendant [34]

[Not legible]

EXHIBIT "A"

UNITED STATES CUSTOMS SERVICE

Crew 39.

MASTER'S OATH ON ENTRY OF VESSEL FROM  
FOREIGN PORT

I, M. Andreasen, solemnly swear that I am now and was during this voyage the master of the American S/S "Montebello" that arrived at Port San Luis, Calif., on (Flag, rig or power, name) December 24, 1940; that this voyage began at Talara, Peru on November 28, 1940, and included the following ports from which said vessel sailed in the order and on the dates stated, viz, Vancouver, B. C. 12/17/40.

.....

that the manifest subscribed in my name, and now delivered by me to the Collector of the Port named above, contains, to the best of my knowledge and belief, a just and true account of all the goods, wares, and merchandise, including packages of every kind and nature whatsoever, which were laden or taken on board the above-named vessel at the said ports or at any time since at other ports or places, together with the names of the passengers and the number of pieces of baggage taken by each passenger at such ports, and that clearance and other papers now delivered by me to the Collector are all that I now have, or have had, that in any way relate to the cargo of the said vessel; and I do further swear that the several articles

specified in the said manifest as sea and ship stores are truly such and are solely for use on the vessel or for the use of the officers, crew, and passengers, and are not intended for sale, or for any other purpose than above mentioned. And I further swear that if I shall hereafter discover or know of any other or greater quantity of goods, wares, and merchandise of any nature or kind whatsoever than are contained in this manifest, I will immediately and without delay make due report thereof to the Collector; and I do likewise swear that all matters whatsoever, in the said manifest are, to the best of my knowledge and belief, just and true; and I further swear that there has been no previous inspection and certification by customs officers of this manifest. I further swear that I have delivered or caused to be delivered to the proper postal officers all mail on board the said vessel during her last voyage. And I further swear, if entering at a sub-comptroller office port, that before entering said vessel at the customhouse I mailed to the comptroller of customs having jurisdiction over the accounts of the collection district in which entry of the vessel is to be made, a true copy of the manifest.

And, *if master of an American vessel*, I further swear that the statement of services performed by consular agents contains only such services as were necessarily and actually performed at my request; and I further swear that in all cases where consular services were required and performed, statements of such services were given me by such consular officers, except at the ports of.....

and that I have no other papers relating to consular transactions. I further swear that the register of the said vessel, herewith presented, contains the name or names of the owner or owners of said vessel, except..... and that no foreign subject or citizen has, to the best of my knowledge and belief, any share, by the way of trust, confidence, or otherwise, in the said vessel.

Sgd: M. Andreasen,

Master.

Port San Luis, Calif., May 9, 1941.

I Certify this to be a true and correct copy of the Original filed at this office.

E. F. James

Deputy Collector.

Sworn to before me on December 24, 1940.

Sgd: E. A. Palfrey,

a Acting Deputy Collector.

Time entered: 9:30 A. M.

Deaths nil

Tonnage 5107 net.

Tonnage tax certificate No. 440664

Fee certificate No. 944118.

Fees under Sec. 2654, R. S. 2.50

Fees under Sec. 4186, R. S.—

Tonnage duty \$306.42 Date 1st. Payment 12/24/40

Date last payment—12/24/40.

Tonnage certificate fee.....

(Foreign vessels)

[Endorsed]: Filed Mar. 12, 1943. [35]

[Title of District Court and Cause.]

## STIPULATION OF FACTS

It Is Hereby Stipulated and Agreed, by and between the attorneys for the respective parties hereto, that the facts herein are as follows:

First: Plaintiff, Union Oil Company of California, is a corporation existing under the laws of the State of California, with its principal place of business in Los Angeles, California, and was incorporated in 1890 for the purpose of exploring, mining, extracting, producing, refining, selling, importing, exporting, distributing and transporting, by land and sea, petroleum, oil, hydrocarbon substance and their by-products and derivatives.

Second: Defendant, William Jennings Bryan, Jr., a citizen of the State of California, resident in the City and County of Los Angeles, California, is, and at all material times was, duly appointed and qualified as Collector of Customs for [36] the Port of Los Angeles, Customs Collection District No. 27, including the Port of San Luis, California, and among the duties of said defendant as such Collector of Customs under the laws of the United States was, and is, the supervision and the exercise of authority and control over the entrance and clearance of vessels arriving at the Port of San Luis from foreign ports; and the exaction and collection of entrance and clearance fees and the collection of tonnage duty or tax on vessels arriving at said Port of San Luis from foreign countries.

Third: Plaintiff now is and at all material times was the owner and operator of the American Tank Steamer Montebello, an ocean-going vessel of 5,107 net tons,

which at all material times was owned and operated by plaintiff and employed by plaintiff in transporting plaintiff's property.

Fourth: On or about October 23, 1940, said T/S Montebello loaded 20,163 barrels of crude petroleum, 29,903 barrels of fuel oil and 25,328 barrels of diesel oil at Los Angeles, California, destined for discharge at various ports in Chile (S. A.).

Fifth: On or prior to October 23, 1940, the crew of the T/S Montebello signed ship's articles for a voyage to Iquique, Valparaiso and Antofagasta, Chile, and return to a Pacific Coast United States port.

Sixth: On October 23, 1940, T/S Montebello cleared from the Port of Los Angeles to the Port of Iquique, Chile.

Seventh: On November 12, 1940, said T/S Montebello discharged 11,241 barrels of fuel oil at Iquique, Chile, and cleared for Valparaiso, Chile.

Eighth: On November 17, 1940, said vessel discharged 19,905 barrels of crude oil at Valparaiso, Chile; said vessel thereupon cleared for Antofagasta, Chile, and upon arrival there discharged her remaining cargo.

Ninth: Upon completion of discharge at Antofagasta, [37] said T/S Montebello proceeded in ballast to Talara, Peru, where she loaded 76,984 barrels of crude petroleum on November 27, 1940, and thereupon cleared for Vancouver, British Columbia.

Tenth: Said T/S Montebello proceeded from Talara to Vancouver and upon arrival in that port she discharged her entire cargo on December 17, 1940.

Eleventh: The Montebello proceeded in Ballast from Vancouver to Port San Luis, California, after she had discharged her entire cargo at Vancouver, arriving in San Luis on December 24, 1940.

Twelfth: Upon arrival at San Luis, M. Andreasen, the Montebello's Master, entered the vessel at the Custom House and filed the "Master's Oath on Entry of Vessel from Foreign Port," a certified copy of which is hereto annexed, marked Exhibit "A" and made a part hereof, only after refusal of the Deputy Collector of Customs at the Port of San Luis to accept a Master's Oath on said Form 3251 which showed the Montebello as arriving from Vancouver, Canada, said Deputy Collector of Customs at the Port of San Luis refusing to accept the same and requiring that the oath show the vessel as arriving from Talara, Peru.

Thirteenth: Upon the Montebello's entry and the filing of the aforementioned affidavit, the defendant demanded and collected from the plaintiff tonnage duty at the rate of six (6) cents per ton in the total sum of Three Hundred Six and Forty-two One-Hundredths Dollars (\$306.42), which said payment is evidenced by tonnage tax certificate Number 440664, appended to the Master's affidavit, Exhibit "A" herein, which said certificate is marked "Exhibit B" and made a part hereof.

Fourteenth: After the Montebello entered as aforesaid, her crew was paid off and discharged before a United States Shipping Commissioner. [38]

Fifteenth: After entering as aforesaid, the *M/S* Montebello surrendered her certificate of registry, giving as a reason therefor that her trade had been changed from foreign to coastwise and was issued a certificate of en-

rollment and license entitling her to engage in the coast-wise trade.

Sixteenth: On May 7, 1941, plaintiff applied to the Director of the Bureau of Marine Inspection and Navigation, hereinafter referred to as the Director, for a refund of Two Hundred Four and Twenty-eight One-Hundredths Dollars (\$204.28), representing the difference between the amount of the tonnage tax computed at the six (6) cent rate and the amount computed at the two (2) cent rate, which plaintiff deemed applicable. Said application was made by verified letter dated May 7, 1941, hereunto annexed, marked Exhibit "C" and made a part hereof, which was delivered to defendant for transmittal. Defendant procured a report of the facts relative to the imposition and collection of aforesaid tonnage tax from the Deputy Collector in Charge, E. P. James, which said report is hereunto annexed, marked Exhibit "D" and made a part hereof. The defendant hereupon transmitted the application for refund (Exhibit "C"), together with report of the Deputy Collector (Exhibit D), to the Director by letter dated May 14, 1941, hereunto annexed and marked Exhibit "E" and made a part hereof.

Seventeenth: As appears by the affidavit of Richard S. Field, Director, dated December 4, 1941, any party in interest to a matter involving payment of tonnage taxes may obtain, upon request, an opportunity to appear and be heard either before the Director or one of his qualified assistants. A copy of the aforesaid affidavit is hereunto annexed, marked Exhibit "F" and made a part hereof.



However, neither the Customs brokers who entered vessels nor the owners of the vessels were ever advised that an oral hearing could be had. [39]

Eighteenth: On or about May 31, 1941, the Director after deliberation found and decided that the tonnage taxes assessed upon the entry of the Montebello, December 24, 1940, were correctly assessed and denied the application for a refund.

The Director's opinion and decision is contained in a letter to the defendant dated May 21, 1941, copy of which is hereunto annexed, marked Exhibit "G" and made a part hereof. Plaintiff was duly notified of the aforesaid decision.

Nineteenth: On January 25, 1939, the Director decided on application for refund of tonnage taxes against the M/S Ontariolite, a copy of which decision is contained in a letter to the Deputy Collector of Customs in Charge at San Pedro, dated January 25, 1939, a copy of which is hereunto annexed, marked Exhibit "H" and made a part hereof.

Twentieth: On February 24, 1938, the Director decided an application for a refund of tonnage taxes against the Rotterdam, a copy of which decision is contained in a letter to the Deputy Collector of Customs in Charge at San Pedro, dated February 24, 1938, a copy of which is hereunto annexed, marked Exhibit "I" and made a part hereof.

“Twenty-first: Panamanian steamship Santa Maria entered the Port of San Francisco, California, on September 9 and September 20, 1940. The Master filed a ‘Master’s Oath on Entry, stating that the vessel entered from Vancouver, B. C., on the basis of which tonnage tax was assessed and collected at the rate of 2 cents per ton. The vessel had in fact completed a voyage similar to the voyage of the Montebello above described. This fact was unknown to the defendant, although it may have been known to the clerk in defendant’s office who actually assessed and collected the tax.” [40]

WALTER I. CARPENETI

Attorney for Plaintiff, Union Oil Company of California

CHARLES H. CARR

United States Attorney, Attorney for Defendant, William Jennings Bryan, Jr., individually and as Collector of Customs for the Port of Los Angeles, Customs Collection District No. 27

JAMES L. CRAWFORD

Assistant United States Attorney

Attorneys for defendant, William Jennings Bryan, Jr.

Los Angeles, California

September 17, 1943

[Endorsed]: Filed Sep. 17, 1943. [41]

[Title of District Court and Cause.]

OPINION

Walter I. Carpeneti, Esquire, of San Francisco, California, representing the Plaintiff.

Charles H. Carr, United States Attorney, John M. Gault, Assistant United States Attorney, and James L. Crawford, Assistant United States Attorney, representing the Defendant.

O'Connor, J. F. T., Judge.

This is an action to recover tonnage taxes assessed and paid upon the plaintiff's vessel, American tank steamer, Montebello, pursuant to 46 U. S. C. sec. 121.

Three questions are presented to the court for determination: (1) Has this court jurisdiction of a controversy involving the assessment and collection of tonnage taxes? (2) Were the tonnage taxes properly assessed? (3) Can the Collector of Customs be sued to recover a tonnage tax, if such tax is found to be illegally collected?

Under the first contention only two decisions, both written fifty-three years ago, (North German Lloyd Steam- [42] ship Co. vs. Hedden, 43 Fed 17—May 21, 1890—Circuit Court for the District of New Jersey; and Laidlaw vs. Abraham, 43 Fed. 297—August 18, 1890—Circuit Court for the District of Oregon) have passed upon the question.

The parties have filed extensive and carefully prepared briefs. The final decision of the courts will affect the tonnage tax, and therefore the commerce flowing into our ports. The facts are stipulated. The application of those facts to the law is the court's problem.

The plaintiff, Union Oil Company of California "now is and at all material times was the owner and operator of the American Tank Steamer Montebello, an ocean-going vessel of 5,107 net tons . . ." On October 23, 1940, the Montebello was loaded with a cargo of crude petroleum, oil fuel and diesel oil at Los Angeles, California, destined for discharge at various ports in Chile, South America. The crew of said vessel signed ship's articles for a voyage to Iquique, Valparaiso, and Antofagasto, Chile, and return to a Pacific Coast United States Port. On various dates after October 23, 1940, when the tank steamer, Montebello, cleared from Port of Los Angeles, its cargo was discharged at the respective ports designated on different dates until it cleared for Antofagasto. Upon completion of discharge at the last named port, the Montebello proceeded in ballast to Talard, Peru, where she loaded a cargo of crude petroleum, and thereupon cleared for Vancouver, British Columbia. Upon arrival in that port, she discharged her entire cargo. The Montebello then proceeded in ballast from Vancouver, B. C. to Port San Luis, California, arriving December 24, 1940. Upon arrival at San Luis, the Master of the vessel tendered to the Deputy Collector of Customs a Master's Oath on form No. 3251, showing the Montebello as arriving from Vancouver, [43] Canada. The Collector refused to accept the Master's Oath and demanded an Oath showing the vessel arrived from Talaro, Peru, which was furnished, and then the Collector demanded and collected from plaintiff tonnage duty at the rate of six (6) cents per ton in the total sum of three hundred six and forty-two one-hundredths dollars.

Following the entry of the Montebello, her crew were paid and discharged before a United States Shipping

Commissioner. The certificate of registry was surrendered owing to a change of trade from foreign to coast-wise operations. On May 7, 1941, the plaintiff applied to the Director of the Bureau of Marine Inspection and Navigation, hereinafter referred to as the Director, for refund of two hundred four and twenty-eight hundredths dollars, representing the difference between the amount of tonnage tax computed at the six (6) percent rate and the amount computed at two (2) percent, which the plaintiff deemed applicable. It appeared by affidavit that any party in interest to a matter involving the payment of tonnage taxes may obtain, upon request, an opportunity to appear and be heard either before the Director or one of his qualified assistants. Neither the Customs brokers, who entered vessels, nor the owners of the vessels, were ever advised that an oral hearing could be had. On May 31, 1941 the Director decided that the tonnage tax was correctly assessed upon entry of the Montebello, on December 24, 1940. The application for refund was denied.

The statute provides:

“The Commissioner of Navigation shall be charged with the supervision of the laws relating to the ad-measurement of vessels, and the assigning of signal letters thereto, and of designating their official number; and on all questions of interpretation growing out of the execution of the laws relating to these subjects, and relating to the collection of tonnage tax, and to the refund of [44] such tax when collected erroneously or illegally, his decision shall be final.”

Act, July 5, 1884. 46 U. S. C. A. 3., 23 Stat. 119.

Prior to the enactment of the Act of July 5, 1884, an appeal could be taken to the Secretary of the Treasury

for a refund of tonnage tax, (Act of June 30, 1864) and to the Department of State upon the interpretation of treaties involving the collection of said tax. The Act of July 5, 1884 was a reorganization measure. See statement, Representative Dingley, 15 Congressional Record, Part 4. This Act ended administration confusion and made the decision of the Commissioner of Navigation final, thus terminating appeals to the Secretary of the Treasury, the Secretary of State, or any other administrative head. There was no intention on the part of Congress to deprive the courts of jurisdiction.

“By the Act of June 30, 1932, Chapter 314, Section 501 (47 Stat. 415), (5 U. S. C., Section 597a), the Bureau of Navigation was consolidated with the Steamboat Inspection Service into the Bureau of Navigation and Steamboat Inspection, under the Chief of the new bureau, who succeeded to the duties and powers of the Commissioner of Navigation under the 1884 Act quoted above. (46 U. S. C., Section 3). By the Act of May 27, 1936, Chapter 463, Section 1, 49 Stat. 1380, 5 U. S. C. A., Section 597a-1, the name of the bureau was changed to “Bureau of Marine Inspection and Navigation”. The Director of the renamed bureau was charged with the duties and powers of the former Commissioner of Navigation under the 1884 statute quoted above. (46 U. S. C. A., Supp. Section 1 note). . . .

“The functions of the Bureau of Marine Inspection and Navigation were transferred to the Bureau of Customs by Executive Order No. 9083, effective March 1, 1942, and published in (1942) 7 Fed. Reg. 1609, and the powers of the Bureau of Marine In-

spection and Navigation were vested in the Commissioner of Customs by the same order, which was an exercise of the statutory powers granted the President to reorganize the executive branch of the Government.)”

Going now directly to the question of jurisdiction, [45] we must examine carefully the Hedden and the Laidlaw opinions. The Hedden opinion clearly states that the question of jurisdiction was raised by the court *sua sponte*. The Court said:

“ . . . on the other hand, the labor and responsibility of the court have been increased by the omission of defendant’s counsel to furnish any assistance towards the solution of the questions and permitting them to pass *sub silentio*.”

It is reasonable to conclude that the government assumed the court had jurisdiction. The Attorney General, five years prior to the Hedden decision, (June 12, 1885—18 Op. Atty. Gen. 197) held that the Act in question was designed to terminate the right of appellate review formerly existing in the Secretary of the Treasury and the Secretary of State. The tonnage tax and the power of the Commissioner of Navigation were directly at issue in the Hedden case, and the court held that:

“Congress has seen fit to constitute him the final arbiter in certain disputes and Congress, alone, can supply a remedy for any wrong which may have arisen from his construction of the law relating to the collection of tonnage due.”

The court further held Congress had the authority under the court to vest in the Commissioner the power to make final decisions.

Three months after the Hedden decision the Circuit Court for the District of Oregon rendered its opinion in *re Laidlaw vs. Abraham*, 43 Fed. 297. The plaintiff claimed the wrongful collection of a tonnage tax and instituted suit. The court at first decided against the plaintiff and held in *re Laidlaw*, 42 Fed. 401, decided May 13, 1890:

“. . . the decision of the Commissioner of the Navigation seems to be final.”

However, [46] about three months thereafter the same court reversed its own opinion in *re Laidlaw vs. Abraham*, 43 Fed. 297, which was decided August 18, 1890. The question of jurisdiction was directly raised. The defendant filed a general demurrer to the complaint, urging that the facts did not state a cause of action and the court is without jurisdiction. Judge Deady said:

“The only other point made in support of the demurrer is that the decision on the appeal to the secretary was, under the Act of July 5, 1884, (23 St. 118,) in fact made by the commissioner of navigation, and is by said act made final, and is therefore a bar to this action.

This act is entitled “ ‘An act to constitute a bureau of navigation in the treasury department.’ ” The commissioner created by it is charged, “ ‘under the direction of the secretary of the treasury’ ” with many duties concerning “ ‘the commercial, marine, and merchant seamen of the United States;’ ” and,



by section 3 thereof, "with the supervision of the laws relating to the admeasurement of vessels and the assigning of signal letters thereto, and of designating their official number; and on all questions of interpretation growing out of the execution of the laws relating to these subjects, and relating to the collection of tonnage tax, and to the refund of such tax when collected erroneously or illegally, his decision shall be final.'"

At first blush it may appear that this provision in the act of 1884 repealed so much of sections 2931, 3011, Rev. St., as gives the person paying such illegal tax the right of redress in the courts, after an unsuccessful appeal to the department. But, on reflection, I am satisfied that the word "final" is used in this connection with reference to the department, of which the commissioner is generally a subordinate part.

In my judgment, the purpose of the provision is to relieve the head of the department from the labor of reviewing the action of the commissioner in these matters, to sidetrack into the bureau of navigation the business of rating vessels for tonnage duties, and deciding questions arising on appeals from the execution of the same by collectors. The appeal is still taken to the secretary of the treasury, as provided in section 2931, but goes to the commissioner for decision, whose action is "final" in the department, as it would not be but for this provision of the statute.

This being so, and nothing appearing to the contrary, it follows that the right of action given to the unsuccessful appellant in such cases is not taken away. The appeal to the department has simply been

decided by the commissioner, rather than the secretary, and, that having been adverse to the plaintiff, his right of action against the collector attaches at once." [47]

Several considerations lead this court to follow the Laidlaw opinion rather than the Hedden opinion.

(1) No appeal was taken by the government, thus creating a strong inference that the government acquiesced in the decision. (2) The court handed down an opinion and after more careful consideration reversed itself. (3) The usual rule is to follow the later decision where two precedents of equal standing are at variance and irreconcilable. (4) The Attorney General of the United States, in advising the President on his power to reverse a decision of the Commissioner, referred to the Laidlaw case and to the right of the aggrieved party to bring an action in the courts. 20 Op. Atty. Gen. 367, March 23rd, 1892.

Harper vs. Charlesworth, 4 Barn & C 589; Allen's Estate, 109 Pa. 489; 1 Atl. 82; Chicago Ry Co. vs. Van Cleave 52 Kan. 665; 33 Pac. 472.

Congress has conferred jurisdiction on district courts to hear and determine the question at issue in this case. Judicial Code, sec. 24, as amended. Sec. 41, Title 28—sub. sec. 5, as amended, March 3, 1911, reads as follows:

"Cases under internal revenue, customs and tonnage laws. Fifth. Of all cases arising under any law providing for internal revenue, or from revenue from imports or tonnage, except those cases arising under any law providing revenue from imports, jurisdiction

of which has been conferred upon the Court of Customs and Patent Appeals. Mar. 3, 1911, c. 231, sec. 24, par. 5, 36 Stat. 1092; Mar. 2, 1929, c. 488, sec. 1, 45 Stat. 1475”

The term “revenue law” when used in connection with the jurisdiction of the courts of the United States, means a law imposing duties on imports or tonnage, or a law providing in terms for revenue; that is to say, a law which is directly traceable to the power granted to Congress by Sec. 8, Art. I, of the Constitution, ‘to lay and collect taxes, [48] duties, imports and excises. *United States vs. Hill*, 123 U. S. 681. A mere expression of finality of decision by the Commissioner of Navigation does not necessarily imply a limitation upon the jurisdiction of the court. “The law is established that when a person, by the compulsion of the color of legal process, or of seizure of his person or goods, pays money unlawfully demanded, he may recover it back.” *Arkansas Building Association vs. Madden*, 175 U. S. 269.

“The words ‘Commissioner of Navigation’ should read ‘Director of the Bureau of Marine Inspection and Navigation’. ‘June 30, 1932, c. 314, sec. 501, 47 Stat. 415; May 27, 1936, c. 463, sec. 1, 49 Stat. 1380, should be added to this citation.”

46 U. S. C. A. 3

Were the tonnage taxes properly assessed?

The provisions of law under which the taxes were assessed are as follows:

“A tonnage duty of 2 cents per ton, not to exceed in the aggregate 10 cents per ton in any one year, is imposed at each entry on all vessels which shall

be entered in any port of the United States from any foreign port or place in North America, Central America. . . . and a duty of 6 cents per ton, not to exceed 30 cents per ton per annum, is imposed at each entry on all vessels which shall be entered in any port of the United States from any other foreign port, not, however, to include vessels in distress or not engaged in trade.”

46 U. S. C. A. 121.

Determination of the port from which the *Montebello* originated for the purpose of the tax involved is a question of fact. The defendant has failed to plead or prove, nor was there any showing of, deliberate evasion of the higher tax of 6 cents by the *Montebello*, in directing that part of its voyage from Talara, Peru, via Vancouver, B. C. to the Port of San Luis. The facts favor the position of the plaintiff. Clearing for Vancouver from Peru with a load of crude petroleum was no idle act. Application of the last port and continuous voyage doctrine is flexible and must be confined to the pecu- [49] liar facts submitted. No advantage of the 2 cent rate could be gained by simply touching a foreign North American port prior to entering a port of the United States. The conditions under which the *Montebello's* Master was required to file the “Master’s Oath on Entry of Vessel from Foreign Port”, can lend little weight to defendant’s position. The Collector arbitrarily determined the foreign port from which the vessel arrived as Talara, Peru, and refused to accept the Master’s Oath on the form which showed the *Montebello* as arriving from Vancouver, Canada.

The Deputy Collector in charge at Port San Luis, California, in his report to the Collector of Customs at Los Angeles, California, stated among other facts:

“Upon arriving and discharging cargo only at Vancouver, B. C., on December 17, 1940, the vessel sailed the same day in ballast for Port San Luis, Calif., arriving here December 24, 1940, where, after entry, the crew was paid off, crew purchases entered, the Document changed from Register to Enrollment, the voyage officially ended and the vessel engaged in coastwise trade.”

No argument is needed to prove that if a vessel incidentally is at a foreign intermediate port to secure ship supplies it cannot be said to have entered such a port, but in the instant case the vessel entered, discharged its cargo and cleared from Vancouver, B. C. It entered the United States port of San Luis from Vancouver, B. C. See Treasury Decision No. 11949 and 10379. The Attorney General ruled that where a vessel discharged all of its cargo at Guantanamo, Cuba, and then proceeded to the United States it was to be considered as coming from Guantanamo. See also: *The African Prince*, (D. C. Mass. 1914), 212 Fed. 552. A vessel enters the United States from that foreign port from which she last cleared. [50]

The same rule applies whether the vessel enters from a foreign port in ballast or with freight loaded at the foreign port. 25 Op. Atty. Gen. 157.

Where the Collector of Customs refuses to accept the Master's Oath designating the foreign port of entry and demands an Oath designating another port, the Master has little choice but to comply lest he place himself in

jeopardy and his vessel subject to forfeiture. Any Master would yield to an illegal demand rather than take such a risk.

"In this case", the defendant urges in its brief, "the Master's Oath on entry contained the statement that the voyage began at Talara, Peru". In a similar instance the Supreme Court was not impressed by an admission under compulsion. Justice Brown said:

"We are not impressed by the argument that, if the plaintiffs insisted that these sugars were not imported merchandise, they should have stood upon their rights, refused to enter the goods, and brought an action of replevin to recover their possession. It is true that, to prevent the seizure of the sugars, plaintiffs did enter them as imported merchandise; but any admission derivable from that fact is explained by their protest against the exaction of duties upon them as such. They waived nothing by taking this course. The collector lost nothing, since he was surprised of the course they would probably take."

*DeLima vs. Bidwell*, 182 U. S. at 179

The third question must be answered in the affirmative. The action against the Collector of Customs is proper. The Ninth Circuit in *re Border Line Transportation Co. vs. Haas*, Collector of Customs, 128 Fed. (2) 192, decided May 18, 1942, was an action against a Collector of Customs to recover certain entrance and clearance fees. The Circuit Court for this District has several times stated that it is the duty of the court to first determine the question of [51] jurisdiction in each case and if the same is lacking, to dismiss the action. "It is the duty of a federal court to determine a question of its jurisdiction sua

sponte though not raised by either party." 20 Fed. Dig. 725, and cases cited. The question of jurisdiction was not raised either by the court or the parties in *re* Border Line Transportation Co., *supra*, and the same was taken for granted.

See also: 5 Stat. A. L. 727, c. 26: 17 Corpus Juris 642; *Cosulich Line of Trieste vs. Elting*, 40 Fed. (2) 220;

The defendant emphasizes the holding of the court in *Cary vs. Curtis*, 3 Howard 236; 44 U. S. 235, (decided in January term, 1845) and makes the following comment:

" . . . that since the passage of the Act of Congress of March 3, 1839, Chapter 82, Section 2, which required collectors of customs to 'place to the credit of the Treasurer of the United States all money which they receive . . . for duties paid under protest,' an action of assumpsit for money had and received will not lie against the collector for the return of such duties so received by him."

The defendant also cites *Arnson vs. Murphy*, 109 U. S. 238 and 115 U. S. 579. However, fifty-six years after the decision in the *Cary* case, *supra*, the Supreme Court in *DeLima vs. Bidwell*, 182 U. S. 1 (1901) again considered the question. The arguments and the opinion cover 220 pages. The court speaking through Mr. Justice Brown, said:

"It was held by a majority of this court in *Cary v. Curtis*, 3 How. 236, that this act precluded an action of assumpsit for money had and received against the collector for duties received by him, and that the act of 1839 furnished the sole remedy. It was said

of that case in *Arnson v. Murphy*, 109 U. S. 238, 240: 'Congress, being in session at the time that the decision was announced, passed the explanatory act of February 26, 1845, which, by legislative construction of the act of 1839, restored to the claimant his right of action against the collector, but required the protest to be made in writing at the time of payment of the duties alleged [52] to have been illegally exacted, and took from the Secretary of the Treasury the authority to refund conferred by the act of 1839. 5 Stat. 349, 727. This act of 1845 was in force, as was decided in *Barney v. Watson*, 92 U. S. 449, until repealed by implication by the act of June 30, 1864,' c. 171, 13 Stat. 202, 214, carried into the Revised Statutes as sections 2931 and 3011. In the same case of *Arnson v. Murphy*, 109 U. S. 238, it was decided that the common-law right of action against the collector to recover back duties illegally collected was taken away by statute, and a remedy given, based upon these sections, which was exclusive. The decision in *Elliott v. Swartwout* was recognized, but so far as respected customs cases (i.e., classification cases) was held to be superseded by the statutes. So in *Schoenfeld v. Hendricks*, 152 U. S. 691, it was held that an action could not be maintained against the collector, either at common law or under the statutes, to recover duties alleged to have been exacted, in 1892, upon an importation of merchandise, the remedy given through the Board of General Appraisers being exclusive.

The criticism to be made upon the applicability of these cases is, that they dealt only with imported merchandise and with the duties collected thereon,



and have no reference whatever to exactions made by a collector, under color of the revenue laws, upon goods which have never been imported at all. With respect to these the collector stands as if, under color of his office, he has seized a ship or its equipment, or any other article not comprehended within the scope of the tariff laws. Had the sugars involved in this case been admittedly imported, that is brought into New York from a confessedly foreign country, and the question had arisen whether they were dutiable, or belonged to the free list, the case would have fallen within the Customs Administrative Act, since it would have turned upon a question of classification.

The fact that the collector may have deposited the money in the Treasury is no bar to a judgment against him, since Rev. Stat. sec. 989 provides that, in case of a recovery of any money exacted by him and paid into the Treasury, if the court certifies that there was probable cause for the act done, no execution shall issue against him, but the amount of the judgment shall be paid out of the proper appropriation from the Treasury." [53]

Judgment for the plaintiff as prayed for in the complaint. Plaintiff will prepare Findings of Fact and Judgment in accordance with this opinion.

Dated October 13, 1943.

J. F. T. O'CONNOR

J. F. T. O'Connor

United States District Judge

[Endorsed]: Filed Oct. 14, 1943. [54]

[Title of District Court and Cause.]

## FINDINGS OF FACT AND CONCLUSIONS OF LAW.

This cause having been submitted upon stipulation of facts and upon written briefs, the plaintiff being represented by Walter I. Carpeneti, Esquire, and the defendant being represented by Charles H. Carr, United States Attorney, John M. Gault and James L. Crawford, Assistant United States Attorneys; and the court having announced its decision in favor of the plaintiff on October 13, 1943, the court now files its written Findings of Fact and Conclusions of Law as follows: [55]

### I.

The court finds that this is a suit at law of a civil nature arising under the Constitution and the laws of the United States providing for the collection of a tonnage duty or tax, as is hereafter more fully set forth, and is a case of actual controversy between the plaintiff and the defendant involving the validity, force and effect of a law of the Congress of the United States of America under the Constitution of the United States of America.

### II.

The court finds that plaintiff, Union Oil Company of California, is a corporation existing under the laws of the State of California, with its principal place of business in Los Angeles, California, and was incorporated in 1890, for the purpose of exploring, mining, extracting, producing, refining, selling, importing, exporting, distributing and transporting, by land and sea, petroleum, oil hydrocarbon substance and their by-products and derivatives.

III.

The court finds that defendant, William Jennings Bryan, Jr., a citizen of the State of California, resident in the City and County of Los Angeles, California, is, and at all material times was, duly appointed and qualified as Collector of Customs for the Port of Los Angeles, Customs Collection District No. 27, including the Port of San Luis, California, and among the duties of said defendant as such Collector of Customs under the laws of the United States was, and is, the supervision and the exercise of authority and control over the entrance and clearance of vessels arriving at the Port of San Luis from foreign ports; and the exaction and collection of entrance and clearance fees and the collection of tonnage duty or tax on vessels arriving at said Port of San Luis from foreign countries [56]

IV.

The court finds that plaintiff now is and at all material times was the owner and operator of the American Tank Steamer Montebello, an ocean-going vessel of 5,107 net tons, which at all material times was owned and operated by plaintiff and employed by plaintiff in transporting plaintiff's property.

V.

The court finds that on or about October 23, 1940, said T/S Montebello loaded 20,163 barrels of crude petroleum, 29,903 barrels of fuel oil and 25,328 barrels of diesel oil at Los Angeles, California, destined for discharge at various ports in Chile (S. A.).

VI.

The court finds that on or prior to October 23, 1940, the crew of the T/S Montebello signed ship's articles for a voyage to Iquique, Valparaiso and Antofagasta, Chile, and return to a Pacific Coast United States port.

## VII.

The court finds that on October 23, 1940, the T/S Montebello cleared from the Port of Los Angeles to the Port of Iquique, Chile.

## VIII.

The court finds that on November 12, 1940, said T/S Montebello discharged 11,241 barrels of fuel oil at Iquique, Chile, and cleared for Valparaiso, Chile.

## IX.

The court finds that on November 17, 1940, said vessel discharged 19,905 barrels of crude oil at Valparaiso, Chile; said vessel thereupon cleared for Antofagasta, Chile, and upon arrival there discharged her remaining cargo.

## X.

The court finds that upon completion of discharge at Antofagasta, the said T/S Montebello proceeded in ballast to Talara, Peru, where she loaded 76,984 barrels of crude petroleum on November 27, 1940, and thereupon cleared for Vancouver, British Columbia. [57]

## XI.

The court finds that said T/S Montebello proceeded from Talara to Vancouver and upon her arrival in that port she discharged her entire cargo on December 17, 1940.

## XII.

The court finds that the Montebello proceeded in ballast from Vancouver to Port San Luis, California, after she had discharged her entire cargo at Vancouver, arriving in San Luis on December 24, 1940.

### XIII.

The court finds that upon arrival at San Luis, M. Andreasen, the Montebello's Master, entered the vessel at the Custom House and filed the "Master's Oath on Entry of Vessel from Foreign Port," only after refusal of the Deputy Collector of Customs at the Port of San Luis to accept a Master's Oath on said Form 3251, which showed the Montebello as arriving from Vancouver, Canada, said Deputy Collector of Customs at the Port of San Luis refusing to accept the same and requiring that the oath show the vessel as arriving from Talara, Peru.

### XIV.

The court finds that upon the Montebello's entry and the filing of the aforementioned affidavit, the defendant demanded and collected from plaintiff tonnage duty at the rate of six (6) cents per ton in the total sum of Three Hundred Six and Forty-two One Hundredths Dollars (\$306.42), which said payment is evidenced by tonnage tax certificate Number 440664, appended to the Master's affidavit.

### XV.

The court finds that after the Montebello entered as aforesaid, her crew was paid off and discharged before a United States Shipping Commissioner.

### XVI.

The court finds that after entering as aforesaid, the T/S Montebello surrendered her certificate of registry, giving as a [58] reason therefor that her trade had been changed from foreign to coastwise and was issued a certificate of enrollment and license entitling her to engage in the coastwise trade.

## XVII.

The court finds that on May 7, 1941, plaintiff applied to the Director of the Bureau of Marine Inspection and Navigation, hereinafter referred to as the Director, for a refund of Two Hundred Four and Twenty-eight One Hundredths Dollars (\$204.28), representing the difference between the amount of the tonnage tax computed at the six (6) cent rate and the amount computed at the two (2) cent rate, which plaintiff deemed applicable. Said application was made by verified letter dated May 7, 1941, which was delivered to defendant for transmittal. Defendant procured a report of the facts relative to the imposition and collection of the aforesaid tonnage tax from the Deputy Collector in Charge, E. P. James. The defendant thereupon transmitted the application for refund, together with the report of the Deputy Collector, to the Director by letter dated May 14, 1941.

## XVIII.

The court finds that it appears by the affidavit of Richard S. Field, Director, dated December 4, 1941, any party in interest to a matter involving payment of tonnage taxes may obtain, upon request, an opportunity to appear and be heard either before the Director, or one of his qualified assistants. However, neither the Customs brokers who entered vessels nor the owners of the vessels were ever advised that an oral hearing could be had.

## XIX.

The court finds that on or about May 31, 1941, the Director after deliberation found and decided that the ton-

nage taxes assessed upon the entry of the Montebello, December 24, 1940, were correctly assessed and denied the application for a refund. The director's opinion and decision is contained in a letter to the defendant dated May 21, 1941. Plaintiff was duly notified of [59] the aforesaid decision.

**XX.**

The court finds that on January 25, 1939, the Director decided an application for refund of tonnage taxes on the basis of two (2) cents per ton in favor of the M/S Ontariolite, a copy of which decision is contained in a letter to the Deputy Collector of Customs in Charge at San Pedro, dated January 25, 1939.

**XXI.**

The court finds that on February 24, 1938, the Director decided an application for a refund of tonnage taxes on the basis of two (2) cents per ton in favor of the Rotterdam, a copy of which decision is contained in a letter to the Deputy Collector of Customs in Charge at San Pedro, dated February 24, 1938.

**XXII.**

The court finds that on or about May 31, 1941, the Director distinguished between the Ontariolite, Rotterdam, and Montebello voyages and found and decided that the tonnage taxes assessed upon the entry of the Montebello, December 24, 1940, on the basis of six (6) cents per ton, were correctly assessed and denied the application for a refund, a copy of which decision is contained in a letter to the appellee-defendant, dated May 21, 1941. Plaintiff was duly notified of the aforesaid decision.

## XXIII.

The court finds that the Panamanian steamship Santa Maria entered the Port of San Francisco, California, on September 9 and September 20, 1940. The Master filed a "Master's Oath on Entry" stating that the vessel entered from Vancouver, B. C., on the basis of which tonnage tax was assessed and collected at the rate of two (2) cents per ton. The vessel had in fact completed a voyage similar to the voyage of the Montebello, above described. This fact was unknown to the defendant, although it may have been known to the clerk in defendant's office, who actually assessed and collected the tax. [60]

## XXIV.

The court finds that the demand and collection of said tonnage duty or tax in excess of two (2) cents per ton from the plaintiff was and is illegal, arbitrary, oppressive and deprives plaintiff of his property without due process of law.

## Conclusions of Law.

From the foregoing facts, the court makes the following Conclusions of Law:

## I.

That this is a cause of action within the jurisdiction of the District Courts of the United States.

## II.

That a vessel arriving in ballast at a port of entry in the United States from a port in British Columbia, where said vessel had entered and discharged fully its cargo theretofore loaded at a foreign port for discharge of said



port in British Columbia, is subject to the payment of tonnage duty or tax at the rate of two (2) cents a ton under the provisions of Section 121 of Title 46 of the United States Code.

III.

That the requirement that said vessel pay tonnage duties at the rate of six (6) cents per ton was and is contrary to law.

IV.

That said vessel was entitled to pay tonnage duties at the rate of two (2) cents per ton.

V.

That plaintiff is entitled to judgment in the sum of Two Hundred Four Dollars and Twenty-eight Cents (\$204.28), together with interest from date of exaction, and costs of suit.

Dated: This 7 day of August, 1944.

J. F. T. O'Connor  
United States District Judge

Approved as to form as provided in Rule 7: [61]

CHARLES H. CARR  
United States Attorney  
By Mildred L. Kluckhohn  
MILDRED L. KLUCKHOHN  
Assistant U. S. Attorney.

[Endorsed]: Filed Aug. 7, 1944. [62]

In the District Court of the United States in and for the  
Southern District of California Central Division

No. 1749-O'C Civil.

UNION OIL COMPANY OF CALIFORNIA, a cor-  
poration,

Plaintiff,

vs.

WILLIAM JENNINGS BRYAN, JR., individually and  
as Collector of Customs for the Port of Los Angeles,  
Customs Collection District No. 27,

Defendant.

#### FINAL DECREE

The above-entitled case came on regularly for pre-trial hearing on June 10, 1943, at 10 o'clock A. M., before the court, Walter I. Carpeneti, Esq., appearing for the plaintiff, and Charles H. Carr, United States Attorney, and James L. Crawford, Assistant United States Attorney, appearing for the defendant, and the case having been submitted on written stipulation of facts, and the Court having announced its decision, and separate Findings of Fact and Conclusions of Law, and Certificate of Probable Cause having been submitted to and signed and filed by the Court;

It Is Ordered, Adjudged and Decreed that the plaintiff take judgment in its action in the sum of Two Hundred Four and [63] 28/100 Dollars (\$204.28), with interest

from December 24, 1940, in the sum of Forty-four and 50/100 Dollars (\$44.50), together with costs of suit in the sum of \$26.50.

Dated: Los Angeles, California, August 16, 1944.

J. F. T. O'CONNOR  
United States District Judge

Approved as to form as Provided in Rule 7:

CHARLES H. CARR  
United States Attorney

By: Clyde C. Downing  
Assistant U. S. Attorney

Judgment entered Aug. 16, 1944. Docketed Aug. 16, 1944 Book 27, page 248. Edmund L. Smith, Clerk; by Loius J. Somers, Deputy.

{Endorsed}: Filed Aug. 16, 1944. [64]

[Title of District Court and Cause.]

CERTIFICATE OF PROBABLE CAUSE

(R. S. 989; 28 U. S. Code 842)

It Appearing to the satisfaction of the court that the subject matter of the judgment rendered in favor of the plaintiff and against the defendant in the above entitled action is money exacted by, or paid to, the defendant and by him paid into the Treasury of the United States in the performance of his official duty as Collector of Customs;

The Court hereby certifies that there was probable cause for the acts of the defendant in collecting said money and paying the same into the Treasury and that said defendant acted under the directions of the Secretary of Commerce or other proper officer of the government in so doing.

Dated: this 16 day of August, 1944.

J. F. T. O'CONNOR

United States District Judge

Approved as to Form as Provided in Rule 7.

WALTER I. CARPENETI

Attorney for Plaintiff.

[Endorsed]: Filed Aug. 16, 1944. [65]

United States District Court Southern District of  
California Central Division.

NOTICE BY CLERK OF ENTRY OF JUDGMENT

Walter I. Carpeneti, Esq.,

354 South Spring St.,

Los Angeles, California.

Chas. H. Carr, Esq.,

United States Attorney.

Clyde C. Downing, Asst.,

6th Floor,

U. S. Postoffice & Courthouse,

Los Angeles, Calif.

Gentlemen:

Re:

UNION OIL COMPANY OF CALIFORNIA, a corp.

v.

WILLIAM JENNINGS BRYAN JR., individually and  
as Collector of Customs for the Port of Los Angeles.  
Customs Collection District No. 27.

1749 O'C Civil

You are hereby notified that Judgment has been entered this day in the above-entitled case, in Civil Order Book No. 27, page 248.

Dated: Los Angeles, California. August 16th, 1944.

EDMUND L. SMITH,

Clerk

By Louis J. Somers

Louis J. Somers,

Deputy Clerk.

[Endorsed]: Filed Aug. 16. 1944. [66]

[Title of District Court and Cause.]

## MEMORANDUM OF COSTS AND DISBURSEMENTS.

## Disbursements

Marshal's Fees—Service of Summons	\$ 6.00
Clerk's Fees Filing Fee for Complaint	10.00
Witness' Fees	
Affidavit to cover Cost Bill	.50
Attorney's Docket Fees (Sec. 824 R. S.) (Sec. 571-2 Title 28 U. S. C.)	10.00
	\$26.50
	Taxed

United States of America, Southern District of California, City and County of San Francisco—ss.

Walter I. Carpeneti, being duly sworn, deposes and says: That he is the Attorney for the Plaintiff in the above-entitled cause, and as such is better informed, relative to the above costs and disbursements, than the said Plaintiff. That the items in the above Memorandum contained are correct, to the best of this deponent's knowledge and belief, and that the services charged therein have been actually and necessarily performed and said disbursements have been necessarily incurred in the said cause.

WALTER I CARPENETI

Subscribed and sworn to before me, this 15th day of August A. D. 1944.

[Seal]

LOUIS WIENER,

Notary public in and for the City and County  
of San Francisco, State of California.

My commission expires August 19, 1947. [67]

Service of the within memorandum of costs and disbursements, and receipt of a copy thereof acknowledged this 19 day of August, A. D. 1944, and defendant consents to immediate tax of above costs.

Chas. H. Carr  
U .S. Attorney  
Wm. W. Worthington  
Asst. U. S. Attorney  
Attorney for Defendant

[Endorsed]: Filed Aug. 19, 1944. [68]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO THE CIRCUIT COURT  
OF APPEALS, NINTH CIRCUIT.

Notice is hereby given that William Jennings Bryan, Jr., individually and as Collector of Customs for the Port of Los Angeles, Customs Collection District No. 27, defendant above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the Final Decree entered in this action on August 16, 1944.

Dated: September ....., 1944.

CHARLES H. CARR,  
United States Attorney,

RONALD WALKER,  
Assistant U. S. Attorney,

By: MILDRED L. KLUCKHOHN,  
Assistant U. S. Attorney,

Attorneys for Defendant and Appellant.

[Endorsed]: Filed & mailed copy to Walter I. Carpeneti. atty. for plf. Oct. 12, 1944. [69]

[Title of District Court and Cause.]

STATEMENT OF POINTS TO BE RELIED UPON  
BY APPELLANT ON APPEAL

Pursuant to Rule 75 of the Federal Rules of Civil Procedure, the appellant herein states that the points upon which it intends to rely on appeal in the above-entitled action are as follows:

1. The Collector of Customs, acting in his official capacity as an officer of the Government, may not be sued in the District Court for the recovery of erroneously assessed tonnage duties. Such a suit is in reality one against the United States which may not be maintained unless the United States has consented [71] to be sued in such form. That consent is lacking.

2. The District Court lacks jurisdiction over a controversy involving the assessment, collection and refund of tonnage taxes. The decision of the Director of the Bureau of Marine Inspection and Navigation as to the correctness of the assessment by the Collector of Customs is final and not subject to judicial review.

3. The determination by the Collector of Customs, as affirmed by the Director of the Bureau of Marine Inspection and Navigation, that the Montebello entered from Talara, Peru, and not from Vancouver, B. C., being a question of fact, is not subject to judicial review. Even if reviewable by the courts, it should have been given great weight and not overturned unless clearly wrong and unsupported by the evidence.

4. The tonnage taxes were correctly assessed by the Collector of Customs. A vessel arriving in ballast at a port of entry in the United States from a port at British



Columbia where said vessel had entered and discharged fully its cargo theretofore loaded at a foreign port for discharge in said port in British Columbia is subject to the payment of tonnage duty or tax at the rate of six cents a ton and not at the rate of two cents a ton under the provisions of Section 121 of Title 46 U. S. C. A.

5. The requirement that said vessel pay tonnage duty at the rate of six cents per ton was in accordance with and not contrary to law.

6. Said vessel is not entitled to pay tonnage duty at the rate of two cents per ton.

7. That the District Court erred in holding that the plaintiff is entitled to judgment in the sum of \$204.28, together with interest from date of exaction and cost of suit.

8. And as further required by the said Rule and Section, [72] appellant designates as necessary for the consideration of the foregoing points the printing of the entire transcript.

Dated: This 4 day of November, 1944.

CHARLES H. CARR  
United States Attorney

RONALD WALKER  
Assistant United States Attorney

Wm. W. Worthington  
WM. W. WORTHINGTON  
Assistant United States Attorney

[Endorsed]: Filed Nov. 6, 1944. [73]

[Title of District Court and Cause.]

### CERTIFICATE OF CLERK.

I, Edmund L. Smith. Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 75 inclusive contain full, true and correct copies of Bill of Complaint for Recovery of Tonnage Duty or Tax Illegally Exacted by the Collector of Customs; Defendant's Motion for Summary Judgment and Other Relief; Notice of Hearing on Motion for Summary Judgment; Order Denying Motion for Summary Judgment; Notice of Entry of Order Denying Motion for Summary Judgment; Notice of Substitution of Attorneys by Consent; Substitution of Attorney; Answer; Stipulation of Facts; Opinion; Findings of Fact and Conclusions of Law; Final Decree; Certificate of Probable Cause; Notice by Clerk of Entry of Judgment; Memorandum of Costs and Disbursements; Notice of Appeal; Affidavit of Service of Notice of Appeal; Statement of Points to be Relied Upon by Appellant on Appeal; and Designation of the Record of Proceedings and Evidence to be Contained in the Record on Appeal which constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

Witness my hand and the seal of said District Court  
this 21st day of November, 1944.

[Seal]

EDMUND L. SMITH,  
Clerk

By Theodore Hocke  
Theodore Hocke,  
Chief Deputy Clerk.

[Endorsed]: No. 10931. United States Circuit Court  
of Appeals for the Ninth Circuit. William Jennings  
Bryan, Jr., Individually and as Collector of Customs for  
the Port of Los Angeles, Customs Collection, District  
No. 27, Appellant, vs. Union Oil Company of California,  
a corporation, Appellee. Transcript of Record. Upon  
Appeal from the District Court of the United States for  
the Southern District of California, Central Division.

Filed November 24, 1944.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for  
the Ninth Circuit.

In the United States Circuit Court of Appeals for the  
Ninth Circuit.

No. 10931

WM. JENNINGS BRYAN, JR., Collector of Customs,  
Appellant,

v.

UNION OIL COMPANY OF CALIFORNIA, a cor-  
poration,

Appellee.

STATEMENT OF POINTS TO BE RELIED UPON  
BY APPELLANT ON APPEAL, AND DESIG-  
NATION OF RECORD SUBMITTED FOR  
CONSIDERATION ON APPEAL.

The United States of America, as appellant in the above-entitled matter, hereby incorporates by reference herein and adopts the statement of points on which appellant intends to rely and appellant's designation of record to be considered on appeal herein which was filed in the District Court of the United States, Southern District of California, Central Division, and which is now part of the record on appeal of said trial court in the above-entitled proceeding.

Dated: This 6 day of November, 1944.

CHARLES H. CARR

United States Attorney

RONALD WALKER

Assistant United States Attorney

Wm. W. Worthington

WM. W. WORTHINGTON

Assistant United States Attorney

Received copy of Statement of Points and Designation  
of Record this 7th day of November, 1944.

Walter I. Carpeneti  
Attorney for Appellee

E. E. (Illegible)  
Secy.

[Endorsed]: Filed Nov. 24, 1944. Paul P. O'Brien,  
Clerk.

